In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-321

JOSEPH LUIS DUNN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native of Mexico, seeks review of an order denying a motion to reopen deportation proceedings. He claims that (1) he is eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (Section 212(c) of the Immigration and Nationality Act) without regard to his conviction for a narcotics violation and that (2) if he is not so eligible, the statutory scheme is unconstitutional because it discriminates against natives of the Western Hemisphere.

Petitioner entered the United States as a permanent resident in 1959. In August 1969, he was ordered deported to Mexico under Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1251 (a)(11),[1] as an alien convicted of violating

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[1] 8 U.S.C. 1251(a)(11) provides in relevant part:

(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

a law relating to the illicit possession of marijuana.[2] The court of appeals in April 1970 affirmed the order of deportation (Pet. App. A , p. iii; 426 F. 2d 894).

On March 9, 1972, petitioner filed a motion to reopen and stay deportation proceedings in order to afford him an opportunity to apply for relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c).[3] That Section permits aliens admitted for permanent residence "not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years" to be admitted to the United States at the discretion of the Attorney General without regard to the provisions excluding them from the United States. The Board of Immigration Appeals denied the motion, ruling that there was "no basis for avoiding the statutory requirement that an alien lawfully admitted for

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> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of * * * any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana * * * .

[2]Petitioner had previously pleaded guilty to one count of possession of marijuana in violation of state law. Two other counts involving possession and transportation of about one pound of heroin were dismissed.

[3]8 U.S.C. 1182(c) provides, in relevant part, as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25) * * * of subsection (a) of this section.

permanent residence must be returning to resume a lawful domicile of seven consecutive years following a temporary, voluntary departure and not under an order of deportation" (Pet. App. B, p. xi). The court of appeals, relying on its earlier decision in *Arias-Uribe* v. *Immigration and Naturalization Service*, 466 F. 2d 1198, affirmed (Pet. App. A).

1. Petitioner contends that he is eligible for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), even though he is under an order of deportation and not returning to the United States after a voluntary departure.[4] The discretionary waiver of exclusion provided for under Section 212(c) (8 U.S.C. 1182(c)) does not, however, apply to petitioner. It is, by its terms, available to permanent resident aliens returning to the United States from abroad and who are not under an order of deportation.[5]

2. Even assuming *arguendo* that the statute is also available to permanent residents aliens who, although under a deportation order, have not yet left this country, if they are eligible for an adjustment of status under Section 245 of the Act, 8 U.S.C. 1255, *Matter of Smith*,

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[4]Petitioner's contention here was rejected by the Ninth Circuit in unreported orders in *Martin Rendon-Rojas* v. *Immigration and Naturalization Service*, No. 74-2264, decided September 27, 1974, and *Benjamin Rodriquez* v. *Immigration and Naturalization Service*, No. 74-2226, decided August 16, 1974.

[5] *Matter of Smith, supra*, on which petitioner relies, does not support his position. In that case the applicant was deportable as an alien who had been convicted of two crimes involving moral turpitude, neither of which involved a narcotics offense. An alien convicted of non-narcotics offense involving moral turpitude, although generally excludable from the United States, may obtain a visa for entry into this country if his exclusion "would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or son or daughter of such alien.", 8 U.S.C. 1182(h) (Section 212(h) of the Act, as amended). However, no similar provision is applicable to narcotics offenders, such as petitioner.

11 I & N Dec. 325; *Arias-Uribe* v. *Immigration and Naturalization Service,* 466 F. 2d 1198, 1199 (C.A. 9), petitioner, as a native of the Western Hemisphere, is ineligible for adjustment of status under Section 245(c) (8 U.S.C. 1255(c)). It is well established that Congress has the "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123; see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767, quoting with approval the opinion of Mr. Justice Frankfurter in *Galvan* v. *Press,* 347 U.S. 522.[6] Since Congress may exclude all aliens from the Western Hemisphere, it follows *a fortiori* that Congress may limit the discretion of the Attorney General with regard to relief from deportation orders for natives of the Western Hemisphere found guilty of a narcotics offense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[7]

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[6]See also *Faustino* v. *Immigration and Naturalization Service,* 432 F.2d 429 (C.A. 2), certiorari denied, 401 U.S. 921; *Talanoa* v. *Immigration and Naturalization Service,* 397 F.2d 196 (C.A. 9), *Hitai* v. *Immigration and Naturalization Service,* 343 F.2d 466, 467 (C.A. 2), certiorari denied, 382 U.S. 316; *Buckley* v. *Gibney,* 332 F. Supp. 790 (S.D.N.Y.), affirmed, 449 F.2d 1305 (C.A. 2), certiorari denied, 405 U.S. 919.

[7]This issue is also raised in the petition for a writ of certiorari filed in *Anna DiMattina formerly known as Anna Zampitella* v. *Immigration and Naturalization Service,* No. 74-202, in a case arising from the Third Circuit.